

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA §
§
VS. § 4:12-cr-503
§ (Hon. Lee H. Rosenthal)
JASON DANIEL GANDY §

MOTION TO SUPPRESS NEWLY-PRODUCED CELL PHONE EVIDENCE

COMES NOW JASON DANIEL GANDY, DEFENDANT, through counsel Sean Buckley, and files this Motion to Suppress Newly-Produced Cell Phone Evidence, for cause showing the Honorable Court as follows:

1. The Government produced additional discovery to Defendant this week and including today.

On July 11, 2018 and July 13, 2018, the Government produced to Defendant numerous photographs of text messages extracted from Defendant's cell phone. The Government has indicated its intentions to offer the text messages as evidence at trial. Defendant herein moves to suppress this evidence.

2. The Evidence was obtained from Defendant's cell phone in 2018 without a search warrant.

Upon information and belief, in 2012, law enforcement conducted a border search of Defendant's cell phone but did not copy, duplicate, photograph, or otherwise independently preserve the data they observed during their border search. Law enforcement then seized the cell phone, thus preserving the physical device and its contents for future searches and potential evidentiary use.

Upon information and belief, in or about July, 2018, the Government decided to re-examine Defendant's cell phone to see if it contained data of evidentiary value to Defendant's impending trial. However, by this time Defendant's cell phone was no longer located in a U.S. border area, and furthermore, approximately six years have passed since Defendant entered into the U.S. border while possessing the device. Nevertheless, the Government conducted a warrantless search of Defendant's cell phone to re-examine the data contents of the device in or about July, 2018. This warrantless search produced photographs of numerous text messages that Defendant now moves to suppress.

3. The Government's warrantless search was prohibited by Supreme Court precedent.

In 2014, the U.S. Supreme Court handed down *Riley v. California*, 134 S. Ct. 2473 (2014), which addressed the Fourth Amendment reasonableness of warrantless cell phone searches. The *Riley* Court held that a warrant is generally required before searching a cell phone, even when a cell phone is seized incident to arrest. 134 S.Ct. at 2493. The Court left open the possibility that warrantless searches could still be conducted under recognized exceptions, such as exigent circumstances, but that such searches would have to be considered on a case-by-case basis. *See Id.*

Defendant concedes that law enforcement does not need a warrant to conduct a forensic search of a person's cell phone at the border. *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018). But it cannot possibly be the law that an initial border search of an electronic device—no matter what law enforcement discovers during that search—could

anoint law enforcement with the perpetual authority to re-search the device whenever they want and in whatever other place or setting they want, without procuring a warrant.

4. Relief requested.

Defendant moves to suppress any and all evidence extracted from Defendant's cell phone without a warrant and following the time of the initial border search.

Respectfully submitted,

/s/ Sean Buckley
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Certificate of Conference

I certify that I discussed this motion with Assistant United States Attorney Sherri Zack on this the 13th of July, 2018. Ms. Zack stated that she is OPPOSED to this Motion.

/s/ Sean Buckley

Sean Buckley

Certificate of Service

I certify that I provided a copy of Defendant's Proposed Jury Instructions to Assistant United States Attorney Sherri Zack and all parties via the ECF system on this the 13th day of July, 2018.

/s/ Sean Buckley

Sean Buckley